No. 92-515

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,

v.

TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Wisconsin Supreme Court

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

Paul Brest*
814 Tolman Drive
Stanford, California 94305
(415) 723-4455

Alan Cope Johnston
Yonkel Goldstein
Kenneth A. Kuwayti
Douglas W. Phillips
Anna Erickson White
Marc J. Pernick
MORRISON & FOERSTER
755 Page Mill Road
Palo Alto, California 94304-1018
(415) 813-5600

Herbert M. Wachtell
Co-Chair
William H. Brown, III
Co-Chair
Norman Redlich
Trustee
Barbara R. Arnwine
Thomas J. Henderson
Sharon R. Vinick
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

* *Denotes Counsel of Record*

QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit states from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion or other specified status?

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INTEREST OF THE *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights under Law ("the Lawyers' Committee") submits this brief as *amicus curiae* in support of Petitioner, the State of Wisconsin.

The Lawyers' Committee is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to Blacks who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local affiliates have represented the interests of Blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of

municipal services and school desegregation. Over one thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted the Lawyers' Committee in such efforts.

This case raises issues of great importance to the clients served by this *amicus curiae*. The Lawyers' Committee views section 939.645 as an anti-discrimination statute, which, if upheld, will help to protect individual rights. Anti-discrimination criminal laws are a vital link in the chain of legislative and law enforcement efforts to safeguard the civil rights of individuals. The Wisconsin legislature, in enacting section 939.645, has adopted this approach to combat the increasing incidence of discriminatory criminal behavior. The legislature did so while taking great care not to infringe upon guaranteed First Amendment rights. The statute involved in the present case is substantially similar to several existing civil rights and criminal statutes which are consistent with the First Amendment. Section 939.645 should therefore be upheld on analogous grounds.

SUMMARY OF ARGUMENT

The Wisconsin Penalty Enhancement Statute which comes before the Court today, section 939.645(1)(b), Stats. 1989-90, increases the applicable maximum sentence in cases where the defendant selected a victim based on the victim's race or other protected status. No First Amendment rights are implicated by this statute because it is aimed at discriminatory conduct, not speech. The operation of the statute is directly analogous to the operation of civil rights laws which penalize discrimination in employment, education, and public accommodations. Furthermore, enhancing a penalty based

upon the defendant's selection of a particular victim is consistent both with general principles of criminal law and existing criminal statutes. The Federal Sentencing Guidelines, for example, provide for an increased penalty for crimes intentionally directed at a government officer or employee. 18 U.S.C. Appendix 4, § 3A1.2. Section 939.645 should be upheld on precisely the same grounds as the numerous anti-discrimination and criminal statutes which define an offense or punishment in relation to a victim's status. The Court should reaffirm its long-standing teaching that neither discriminatory intent nor discriminatory selection raises any First Amendment issues.

Even if the Court were to conclude that the discriminatory selection of a victim on the basis of the victim's protected status involves expression, the Wisconsin statute should, nonetheless, be upheld. Under *United States v. O'Brien*, 391 U.S. 367 (1968), the state's interest in regulating expressive conduct must be balanced against the individual's right to freedom of expression. Here the state unquestionably has police power to regulate public safety. The Wisconsin legislature could reasonably have concluded that status-dependent crimes, which the statute seeks to regulate, are especially reprehensible, that they produce a greater and more disruptive injury, and that they are particularly difficult to deter; consequently, there can be no question that the legislature was acting within its purview when it enacted this statute. Furthermore, the law is narrowly tailored to address victim selection; any effect that it might have on expressive conduct is incidental at best. Thus, even under the *O'Brien* test, the decision of the Wisconsin Supreme Court should be reversed and the constitutionality of the statute upheld.

ARGUMENT

I. ENHANCING THE PUNISHMENT FOR A CRIME COMMITTED BECAUSE OF THE VICTIM'S RACE OR STATUS DOES NOT HAVE EVEN AN INCIDENTAL EFFECT ON SPEECH.

Section 939.645(1)(b), Stats. 1989-90, subjects a criminal defendant to an enhanced penalty if the defendant "intentionally selects the person against whom the crime is . . . committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . ." It is the commission of a crime against a person selected because of her status that section 939.645 punishes.[1] The statute punishes only conduct.

To come within its reach, section 939.645 plainly requires only (1) that the defendant commit a crime against a victim, and (2) that the defendant have intentionally selected that victim because of that victim's protected status. The statute is not concerned with the actor's speech, or with her views about the victim or the group to which the victim belongs. Like all other anti-discrimination laws, it is concerned only with whether the actor targeted the victim because of the victim's race or other status.

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1 *See State v. Mitchell*, 485 N.W.2d 807, 820 (Wis. 1992) (Bablitch, J., dissenting).

A. Government Regulation of Discriminatory Conduct Does Not Implicate Freedom of Speech.

Section 939.645 closely parallels civil rights laws which impose penalties for discrimination in employment, education, and public accommodations. Civil rights laws penalize otherwise *permissible* conduct (*e.g.*, refusing to employ or rent an apartment to a person) when targeted against individuals who are selected because of their race or other protected status. By the same token, section 939.645 enhances the penalty for engaging in *impermissible* conduct when targeted against individuals who are selected because of their race or other protected status. Title VII of the Civil Rights Act of 1964, for example, bars discrimination "with respect to [the] compensation, terms, conditions, or privileges of employment, *because of* [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Similarly, the Wisconsin statute imposes more severe sentences where a criminal offender selects his victim "because of" the victim's race or other protected status.

This Court has rejected the argument that Title VII impinges on First Amendment guarantees of free speech. In *Hishon v. King & Spalding*, 467 U.S. 69 (1984), the Court held that a female associate in a law firm could state a claim against the firm under Title VII by alleging she was denied equal consideration for partnership, because such consideration was one of her "terms, conditions, or privileges of employment." The Court dismissed the law firm's contention that such a holding would "infringe constitutional rights of expression or association," because the law firm could not show how its right to free speech "would be inhibited by a requirement that it consider petitioner for partnership on her merits." 467 U.S. at 78.

The Court reached a similar conclusion in *Runyon v. McCrary*, 427 U.S. 160 (1976). *Runyon* rejected a First Amendment challenge to 42 U.S.C. section 1981, which guarantees, *inter alia*, that persons of all races in the United States shall have equal rights to make and enforce contracts. *Runyon* held that section 1981 bars a private, non-sectarian school from selecting students on the basis of race and that, as so applied, the statute does not impinge upon First Amendment rights to freedom of association. The *Runyon* Court recognized that the First Amendment provides a right "'to engage in association for the advancement of beliefs and ideas, . .'" and that a right of association "is protected because it promotes and may well be essential to the '[e]ffective advocacy of both public and private points of view, particularly controversial ones' that the First Amendment is designed to foster." *Id.* at 175, *quoting N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958). While private schools may advocate a belief in school segregation,

> it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood v. Harrison*, 413 U.S. 455 (1973), "the Constitution . . . places no value on discrimination," *id.*, at 469, and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections. . . ." *Id.*, at 470. In any event, as the Court of Appeals [in *Runyon*] noted, *"there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."*

Runyon at 176 (emphasis added).

Likewise, Respondent cannot show that the additional penalty imposed on him because of his race-based choice of a victim in any way inhibits his freedom of speech. Respondent was at liberty, under section 939.645, to hurl even the most offensive racial invectives at his victim. Respondent's enhanced penalty, however, stems from his hurling punches rather than words. "[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984), *citing Runyon, supra*, 427 U.S. at 175-176 (Minnesota statute requiring Jaycees to accept women as full members did not abridge the male members' freedom of expressive association).

Respondent essentially claims that the government may not impose a penalty on him simply because of his discriminatory intent. This contention is not only at odds with the cases cited above, but also with the Court's interpretation of 42 U.S.C. section 1985(3), an interpretation which was adopted over twenty years ago and reaffirmed earlier this year. In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Court clarified the scope of section 1985(3), which provides a civil remedy for conspiracy to deprive any person of the equal protection of the laws.[2] The broad sweep of the initial draft of this

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2 42 U.S.C. § 1985(3) provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal

(continued...)

Reconstruction era statute was narrowed by a subsequent amendment, which "centered entirely on the animus or motivation that would be required." *Id.* at 100. Thus:

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment . . . . The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

Id. at 102 (emphasis in original).

Discriminatory animus, therefore, is both an essential and a constitutionally permissible element of section 1985(3). The Court reaffirmed this principle earlier this year when it held that an action to enjoin protestors from obstructing access

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privileges and immunities under the laws . . . [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

to abortion clinics fell outside the scope of section 1985(3). The Court found that the alleged conspirators lacked the discriminatory motivation required by section 1985(3):

> "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

Bray v. Alexandria Women's Health Clinic, ___ U.S. ___, 61 U.S.L.W. 4080, 4082 (1993) *quoting Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). *See also United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 838 (1983) (holding that section 1985(3) does not reach conspiracies "motivated by commercial or economic animus").[3]

While the preceding discussion has focused on federal civil rights legislation, the same principles apply to state fair employment, fair housing, and similar laws. Many states have

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3 The Wisconsin Supreme Court distinguished civil rights laws from section 939.645 in part on the grounds that section 939.645 provides for criminal penalties, as opposed to civil sanctions. *State v. Mitchell*, 485 N.W.2d 807, 817 (Wis. 1992). The Wisconsin Supreme Court cited no authority for this distinction, and this Court has never endorsed it. Indeed, because the standard of proof for conviction under criminal laws is higher than that for judgments under civil laws, and because the fines available under civil laws may be much greater than under criminal laws, a civil statute affecting free speech may be "'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon criminal law.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-278 (1964) *quoting Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

had such laws on the books for several decades, and it would be surprising, to say the least, if they were to be held invalid under the First Amendment as applied to the states through the Fourteenth Amendment.[4]

B. Weighing a Defendant's Selection of the Victim in Ascertaining a Criminal Sentence Is Consistent with Other Criminal Statutes.

Section 939.645 is consistent with criminal statutes as well. For example, 18 U.S.C. section 241, a criminal counterpart to 42 U.S.C. section 1985(3), makes it a crime to conspire to intimidate a person from exercising her constitutional rights.[5] As this Court has held, to fall under

4 Of course, federal anti-discrimination laws enjoy a special status under the Constitution. *See Ex Parte Virginia*, 100 U.S. 339, 345 (1880) (holding that the Thirteenth and Fourteenth Amendments, "were intended to be, what they really are, . . . enlargements of the power of Congress"); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (applying a similar interpretation to legislation enacted under the Fifteenth Amendment). Hence, even if this Court were to hold that section 939.645 conflicted with the First Amendment, it would not be a determination that federal anti-discrimination laws authorized by the Thirteenth, Fourteenth, and Fifteenth Amendments were similarly unconstitutional.

5 That section provides, in the relevant part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> . . .

(continued...)

section 241, a defendant "must act *with a specific intent to interfere with the federal rights in question.*" *United States v. Guest*, 383 U.S. 745, 753-54 (1966). For example:

> [A] conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the *predominant purpose* of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then . . . the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.

Id. at 760 (emphasis added).

While the statute makes it a crime to conspire specifically to intimidate a victim from exercising her rights, it does not follow that any particular message is being proscribed. *See CISPES (Committee in Solidarity with the People of El Salvador) v. Federal Bureau of Investigation*, 770 F.2d 468, 474 (5th Cir. 1985) (holding that 18 U.S.C. § 112(b)(1-2), which, like section 241, proscribes intimidating persons in certain status-based categories, does not condemn a particular message, but prohibits threatening or intimidating conduct); *see also Boos v. Barry*, 485 U.S. 312, 323-26 (1988) (stating that 18 U.S.C. § 112 is content neutral and narrowly tailored to meet the government's "vital interest in complying with international law").

5(...continued)

> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Title 18 U.S.C. section 245 is yet another example of a criminal statute which proscribes the deliberate targeting of protected groups as one of its elements.[6] Among its other

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6 That statute states, in part:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
>
> * * *
>
> (2) any person because of his race, color, religion or national origin and because he is or has been—
>
> (A) enrolling in or attending any public school or public college;
>
> (B) participating in or enjoying any benefit, service . . . or activity provided or administered by any State or subdivision thereof;
>
> (C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof . . .;
>
> (D) serving or attending upon any court of any State in connection with possible service, as a grand or petit juror,
>
> (E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal or facility of any common carrier by motor, rail, water or air;
>
> (F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel. . . .
>
> * * *
>
> shall be fined not more than $1,000 or imprisoned not more than one year or both . . . .

18 U.S.C.A. § 245(2).

provisions, it seeks to protect a potential victim who is selected for intimidation, threats, injury, or interference because of her race, color, religion or national origin and because she is engaging in any of various enumerated acts (such as attending a public school, engaging in interstate commerce, or staying at a hotel). At least one lower court decision, *United States v. Griffin*, 585 F. Supp. 1439 (M.D.N.C. 1983), has specifically focused on the scienter requirement of this statute. Far from holding that the specific intent required by the statute violates the constitution, the court concluded that the required specific intent to interfere with federal rights[7] saves the statute from a constitutional attack based on vagueness. *Id.* at 1444.

Moreover, imposing a different punishment on the defendant in this case because he deliberately selected a victim of a particular race is entirely consistent with basic American criminal law principles. Courts routinely consider the intended choice of or effect on a victim both in categorizing particular crimes and in determining appropriate sentences.

Section 939.645 applies where the victim is selected because she is a member of a class specified by the statute. Other criminal statutes similarly enhance the penalty of a criminal offender based on the victim's membership in a specified class.[8] State capital crime statutes typically list

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7 Specifying that a defendant must have the specific intent to interfere with federal rights provided Congress with the authority to enact this legislation. Of course, states acting pursuant to their police powers have much broader authority to regulate criminal conduct.

8 It is commonplace for criminal statutes to take into account a victim's status when defining or punishing a crime. *See e.g.*, Ala. Code § 13A-5-40(a)(5) (1992); Fla. Stat. Ann. § 921.141(5)(k) (1991);

(continued...)

selection of a police officer as a victim as an aggravating factor which may justify the imposition of the death penalty, and the Court has endorsed this criterion. *See e.g., Jurek v. Texas*, 428 U.S. 262, 276 (1976) (upholding Texas' capital sentencing procedures under Eighth and Fourteenth Amendments). Similarly, the Federal Sentencing Guidelines provide for an enhanced penalty for offenses committed against a government officer or employee when the offense "was *motivated* by such status." 18 U.S.C. Appendix 4, § 3A1.2 (emphasis added).[9]

8(...continued)
Mass. Ann. Laws Ch. 279 § 69(a)(1) (Lawyers Cooperative Publishing 1993); Or. Rev. Stat. § 163.095(2)(a) (1991); 42 Pa. Cons. Stat. § 9711(d)(1) (1991). Moreover, many such laws which include victim status as an element also include criminal intent to select a victim based on her status as a necessary element. *See e.g.*, Alaska Stat. § 12.55.125(1) (1992); Ariz. Rev. Stat. Ann. § 13-703(10) (The Michie Co. 1992); Ark. Code Ann. § 5-10-101(a)(3) (1992); Cal. Penal Code § 190.2(a)(7) (Deering's 1992); Colo. Rev. Stat. § 18-3-107 (1992); Haw. Rev. Stat. § 706-660.2 (The Michie Co. 1992); Ill. Rev. Stat. Ch. 38 para. 9-1(b)(1) (Smith-Hurd 1979 & Supp. 1990); Iowa Code § 707.2 (1991); Kan. Stat. Ann. §§ 21-3409 & 21-3411 (1991); Mich. Comp. Laws § 28.747(1)(3) (1989); Nev. Rev. Stat. § 200.033(7) (The Michie Co. 1991); N.Y. Penal Law § 125.27(1)(a) (Lawyers Cooperative 1992); Ohio Rev. Code Ann. § 2929.04(a)(6) (Baldwin's 1992); Tenn. Code Ann. § 39-13-204(9) (1992); Tex. Penal Code Ann. § 19.03(a)(1) (1993); Utah Code Ann. § 76-5-202(k) (The Michie Co. 1992); Va. Code Ann. § 18.2-31(6) (The Michie Co. 1992); Wash. Rev. Code § 10.95.020(1) (1991).

9 The Federal Sentencing Guidelines have withstood numerous attacks on their constitutionality. In *Mistretta v. United States*, 488 U.S. 361, (1989), this Court affirmed that the guidelines neither violate the separation of powers doctrine nor constitute an excessive delegation of legislative power. Other courts have likewise upheld the Guidelines against various constitutionally based attacks. *See e.g., United States v. Erves*, 880 F.2d 376, *cert. denied*, 493 U.S. 968 (11th Cir. 1989) (procedural and substantive due process); *United States v. Wayne*, 903 F.2d 1188 (8th Cir. 1990) (constitutionally mandated standard of proof). To (continued...)

Respondent contends that a statute which penalizes the selection of a victim based on that victim's membership in a particular class must violate the First Amendment. Under this view, the choice of a victim because she is a police officer, for example, would also constitute expression protected by the First Amendment. Unless Respondent can provide a principled distinction between these statutes and section 939.645, every state or federal statute which provides stiffer penalties for crimes committed with the intent to injure individuals who are members of particular classes must violate the right to free expression. Respondent, however, cannot provide any support for this position.

In summary, the language of section 939.645 is clearly directed at discriminatory conduct. To run afoul of the statute, one need only be guilty of discriminatory conduct—the statute is not concerned with the motivations or beliefs which led to the discriminatory choice of victim. For example, a rapist who victimizes southeast Asian women might do so because he believes that they are less likely to report his crimes to the police. Or, a mugger who only attacks Jews might do so because he thinks that they have more money than others. These criminals, if convicted of their crimes, can have their penalties enhanced under section 939.645. Both criminals "intentionally select" their victims "because of" their protected status—the first to avoid detection and the second to increase his plunder. On the other hand, a bigot who shouts a string of racial epithets at an African-American is outside of the

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9(...continued)
our knowledge, no case has challenged the constitutionality of the Federal Sentencing Guidelines on First Amendment grounds.

statute's reach; her expression is completely unaffected by the Wisconsin statute.[10]

The First Amendment prevents the government from driving "'certain ideas or viewpoints from the marketplace.'" *R.A.V. v. City of St. Paul, Minnesota, supra,* at 2545 n.9 (citations omitted). Section 939.645 does not drive any ideas from the marketplace nor does it strive to; it only seeks to drive status-based crimes from Wisconsin's streets. The marketplace of ideas still remains open to KKK meetings and Nazi rallies.

II. EVEN IF THE COURT WERE TO DETERMINE THAT SECTION 939.645 INCIDENTALLY AFFECTS EXPRESSION, IT DOES NOT VIOLATE THE FIRST AMENDMENT.

Even if this Court were to determine that respondent's violent assault on Matthew Riddick contained a sufficient communicative element to bring it within the scope of the First

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10 In *R.A.V. v. City of St. Paul, Minnesota*, __ U.S. __, 112 S. Ct. 2538 (1992), this Court found a St. Paul ordinance which prohibited "fighting words" that contain "messages of 'bias-motivated' hatred" facially unconstitutional because it prohibited otherwise permissible speech solely on the basis of the subjects that the speech addressed. *Id.* at 2548. *R.A.V.* is distinguishable from the instant case on at least two grounds.

First, the Wisconsin statute is aimed at discriminatory conduct, not expression. The St. Paul ordinance directly targeted "fighting words", which, although outside the normal ambit of First Amendment protection, still constitute a form of expression. *See id.* at 2543-44. *Second*, unlike the St. Paul ordinance, the Wisconsin statute evinces no hostility or favoritism to any particular viewpoint. Rather, the statute targets discriminatory conduct, without regard to the viewpoint that inspired it.

Amendment, section 939.645 is unrelated to the suppression of expression and readily meets the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

A. Statutes That Regulate Conduct Rather Than Speech Are Analyzed Under a Four-Prong Test.

Under well-settled law, the government has a freer hand in restricting conduct combining "speech" and "nonspeech" elements than it has in restricting pure speech. *O'Brien*, 391 U.S. at 376. Where speech and conduct are combined in one course of action, the state's interests in regulating the conduct in question must be balanced against First Amendment rights. In such cases, the statute does not violate the First Amendment if: (1) the regulation falls within the constitutional power of the government; (2) the regulation furthers "an important or substantial governmental interest;" (3) the regulation is "unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 376-377.

B. Section 939.645 Fully Meets the Four-Prong Test.

Because section 939.645 is narrowly tailored to serve several legitimate and compelling governmental interests which are not aimed at suppressing speech, it does not violate the First Amendment.

1. The State of Wisconsin Clearly Has the Power to Enact Laws Criminalizing Discrimination.

The power of the State of Wisconsin to punish criminal conduct is well established. The legislature clearly has the power to enact laws that are necessary to promote the public health, safety and morals. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). Here, in view of the increasing incidence of reported crimes where victims are targeted based on their status[11] and the particular danger of widespread civil unrest resulting from such acts, the Wisconsin state legislature was well within its power to enact section 939.645.

2. Section 939.645 Furthers Several Important Governmental Interests.

The governmental interests served by section 939.645 are compelling. The State of Wisconsin has a substantial interest in penalizing crimes targeted at members of certain groups more than other crimes because, as elaborated below, the legislature could find that they are more reprehensible and socially disruptive, that they have the effect of terrorizing a community, and that they are harder to deter.

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11 B. Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 Stan. L. & Pol'y Rev. 165, 166-168 (forthcoming 1993).

a. Section 939.645 Legitimately Protects the Community's Sense That Status-Dependent Crimes Are Inherently More Reprehensible Because of Their Motivation.

The Wisconsin legislature could reasonably have concluded that status-dependent crimes are inherently more reprehensible due to the status-dependent motivation. That the State of Wisconsin has a legitimate interest in enforcing the community's sense of morality is indisputable. This Court has repeatedly upheld the state's power to do so. For example, just two years ago, this Court upheld a public indecency statute under the *O'Brien* test because it furthered "a substantial government interest in protecting order and morality." *Barnes v. Glen Theatre, Inc.*, __ U.S. __, 111 S. Ct. 2456, 2462 (1991). *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

Moreover, considering the relative evil of an act in determining the degree of punishment has long been viewed as an appropriate method of determining punishment. In *Barclay v. Florida*, 463 U.S. 939, 949 (1983), for example, the Court held that the defendant's desire to start a race war when he indiscriminately murdered a white hitchhiker was relevant to showing aggravating circumstances. As recently as last year, in *Dawson v. Delaware*, __ U.S. __, 112 S. Ct. 1093, 1097 (1992), the Court reaffirmed its holding in *Barclay* that in capital sentencing the judge may consider "evidence of [the defendant's] racial intolerance and subversive advocacy where such evidence was related to the issues involved." In other words, where a criminal act has been committed, an inquiry into the malevolence of defendant's motivations, including discriminatory animus, is appropriate so that a fitting sentence can be set.

In the instant case, of course, a criminal assault was committed. Absent that assault, defendant's apparent belief that whites are appropriate targets for racial violence would be completely protected. Given that assault, however, a trial court would be fully justified in taking into account that the victim was selected because of his race. A legislature can certainly do the same in enacting penalty enhancement provisions.

b. Status-Dependent Violence Has an *In Terrorem* Effect on Members of the Victim's Community and Is More Socially Disruptive.

The extra punishment given to perpetrators of status-dependent crimes is justified by the extra harm that status-dependent crimes cause. Status-dependent violence transforms the injury into a different type of harm which is more damaging to the victim than the same violent act lacking status-dependent motivation. In addition to the injury inflicted on the victim, these crimes have an *in terrorem* effect on members of the victim's community. As one commentator observed, "The effect of Kristallnacht on German Jews was greater than the sum of the damage of buildings and assaults on individual victims." J. Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the Speech?*, 11 Criminal Justice Ethics 3 (forthcoming 1992).

Not only are status-based offenses more damaging than the same offense lacking such motivation because they terrorize the victim and the community, they are also more damaging because they are more socially disruptive. Take, for example, the disturbance caused by the racially charged Rodney King beating. Alternatively, consider the disruption that occurred when a Korean grocer shot and killed a black girl

in Los Angeles. As one court observed: "Such confrontations . . . readily—and commonly do—escalate from individual conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases." *State v. Beebe*, 680 P.2d 11, 13 (Or. App. 1984).

Calculating the magnitude of a criminal penalty based on the terroristic or disruptive effect the crime has on the victim or community is in accordance with well-established principles. In *Coker v. Georgia*, 433 U.S. 584, 598 (1977), for example, this Court explained that rape is a crime deserving serious punishment because, among other harmful consequences, rape can "inflict mental and psychological damage" on the victim and, in addition, "undermine[] the community's sense of security." Similarly, in *R.A.V. v. City of St. Paul*, Justice Stevens noted that "[t]hreatening someone because of her race or religious beliefs may cause particularly severe trauma . . .; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team." 112 S. Ct. at 2561 (Stevens, J. concurring).

c. Crimes Motivated by the Status of the Victim May Be More Difficult to Deter Than Other Crimes.

The Wisconsin statute enhances penalties because status-based crimes need to be deterred even more than non-status-based crimes. The State of Wisconsin could reasonably conclude that conventional criminal statues are not effective in deterring status-dependent crimes. Victims of status-dependent crimes are often exposed to a series of attacks and their assaulters are more likely to repeat their attacks than non-status-based assaulters. National Institute Against Prejudice &

Violence, *The Ethnoviolence Project, Institute Report No. 1*, 5 (1986); C. Wexler and G. Marx, *When Law And Order Works*, 32 Crime & Delinquency 205 (1986). Deterrence is clearly a legitimate justification for determining the degree of punishment. *See Pell v. Procunier*, 417 U.S. 817, 822 (1974).

Racial, ethnic and religious-based criminal acts have divided our society throughout history. Such conduct is not merely a relic of the past. In addition to the recent ethnic and racial disruption in our own nation, every day the newspapers report ethnic violence throughout the world—Protestants and Catholics in Northern Ireland; Serbs, Croats, and Bosnians in former Yugoslavia; Kurds and Sunni Muslims in Northern Iraq. Surely, it is within the power of the states to deter such divisive violence in our own nation.

3. Section 939.645 Is Unrelated to the Suppression of Speech.

As the above justifications for the statute illustrate, the State of Wisconsin's interest in punishing crimes motivated by the victim's status are unrelated to the suppression of speech. Quite to the contrary, the state's aim in enacting section 939.645 is solely to combat the devastating effects of violent status-dependent crimes. Protecting society from crimes targeted at individuals because of their membership in identifiable groups is a separate and distinct goal, unrelated to free speech rights.

4. The Incidental Restriction on Speech, if Any, Caused by the Wisconsin Statute Is No Greater Than Necessary to Further the Governmental Interests Served by Section 939.645.

The Wisconsin legislature has narrowly tailored section 939.645 so that the statute only addresses criminal acts directed at individuals because of their race or other status. The statute does not, for example, create a new crime for those who engage in bigoted speech but do not commit crimes. An individual remains free to express his or her discriminatory views by any means other than committing already proscribed crimes. Further, the statute imposes no penalties on bigots who commit crimes which are not in themselves discriminatory. The statute only provides extra penalties for those who commit crimes against the property or persons of protected groups *because* the victims belong to those groups. In doing so, the statute merely codifies the type of judicial consideration long given to status-dependent conduct, which this court has already deemed constitutionally permissible.

CONCLUSION

While this Court "should be eternally vigilant against attempts to check the expression of opinions we loathe," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), the Wisconsin statute at issue here poses no such risk. It is an exaggeration to say that imposing an additional penalty for the senseless beating of a fourteen year old boy, because the victim was selected on the basis of his race, even

incidentally affects the "free trade in ideas." *Id.* For these reasons, section 939.645 does not abridge freedom of speech in violation of the First Amendment.

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Respectfully submitted,

Paul Brest*
814 Tolman Drive
Stanford, California 94305
(415) 723-4455

Alan Cope Johnston
Yonkel Goldstein
Kenneth A. Kuwayti
Douglas W. Phillips
Anna Erickson White
Marc J. Pernick
MORRISON & FOERSTER
755 Page Mill Road
Palo Alto, California 94304-1018
(415) 813-5600

Herbert M. Wachtell
Co-Chair
William H. Brown, III
Co-Chair
Norman Redlich
Trustee
Barbara R. Arnwine
Thomas J. Henderson
Sharon R. Vinick
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

* *Denotes Counsel of Record*